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THE LAW OF WITNESSES AND EVIDENCE IN CANADA

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Release No. 3, October 2026

The Law of Witnesses and Evidence in Canada (formerly Witnesses) is a leading comprehensive treatment of the law of evidence as it applies to evidence given by witnesses in civil and criminal proceedings, as well as before administrative tribunals, public inquiries, and legislative committees. This is a practical reference work, providing coverage and expert analysis of evidentiary issues as they arise in these types of proceedings. Individual chapters examine testimonial evidence under subjects such as competence, compellability, compelling attendance, examination and cross-examination, and privilege.

This completely revised work also introduces 6 new chapters on a variety of topics and continues on the standards of excellence established by Witnesses, originally authored by Alan W. Mewett and Peter Sankoff.

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What's new in this update:

The release updates the following chapters: Chapter 2 (Relevance and Admissibility), 4 (Burdens of Proof and Presumptions), 5 (Out-of-Court Preparation of Witnesses), 6 (Competence and Compellability), 7 (Witness Testimony: Evidentiary Rules), 9 (Witness Misconduct: Refusing to Give Evidence or Committing Perjury), 11 (Examining Your Own Witness), 16 (Opinion Evidence and the Expert Witness), 17 (Privilege), 19 (Confessions and Other Protected Statements) and 20 (Improperly Obtained Evidence).

Highlights: Case Law

Competence and Compellability — Accused Persons — Officers of Corporations — *Viterra Canada Inc. v. Grain Workers' Union (International Longshoreman's Warehousemen's Union, Local 333)* involved a complex appeal involving a number of citations for contempt. In this case, the relevant rules specifically indicated that anyone cited for contempt could not be forced to testify. The employees of the corporation argued on appeal that the rules were designed to apply not just to individuals at risk, but to employees of a corporation as well. The Federal Court of Appeal was unmoved. Writing for a unanimous Court, Walker J.A. held that the court found that Rule 470(2), which protects a person charged with contempt from being forced to testify, applies only to individuals and not to corporations: *Viterra Canada Inc. v. Grain Workers' Union (International Longshoreman's Warehousemen's Union, Local 333)*, 2026 FCA 121.

Privilege — Legal Advice Privilege — Implied Waiver — State of Mind or Other Fairness Considerations — The Ontario Court of Appeal has held that there is no difference between relying on legal advice and claiming confusion about one's legal position despite receiving legal advice. Ultimately, the critical question is one of reliance. As Copeland J.A. held in *One York Street Inc. v. 2360083 Ontario Limited*:

> The issue that a court assessing a claim of deemed waiver must consider is not whether a party has expressly or explicitly referred to legal advice or the absence of legal advice in a pleading or some other step in a proceeding. Rather, the question is whether the party relies in its claim or defence on its understanding of its legal position. Although such reliance is likely to be easier to see where a party expressly or explicitly relies on the receipt of legal advice, the reliance need not be express. If a party relies in its claim or defence on its state of mind or understanding (or lack of understanding) with respect to its legal position about an issue in the litigation and it obtained legal advice on that issue at a time relevant to its asserted state of mind, then as a matter of fairness, the party's choice to rely on its understanding or lack of understanding of its legal position makes it inconsistent and unfair for the party to maintain privilege over legal advice received regarding the issue on which it injected its understanding of its legal position into the litigation.

One York Street Inc. v. 2360083 Ontario Limited, 2026 ONCA 176.

Privilege — Legal Advice Privilege — Exceptions — Innocence at Stake — Further guidance on the nature of the evidentiary burden was provided by

the Supreme Court in *R. v. Fox*, albeit in a very specific context: a case where the lawyer involved in the communications was herself charged with a crime. Writing for the majority, Justice Jamal recognized that what was required would depend somewhat on the particular context:

> The evidentiary burden at the first stage is flexible and can accommodate limitations on the accused's knowledge. For example, in McClure, this Court recognized that because the accused had no prior access to the civil litigation file to which he sought access, it would have been unfair to demand anything more precise than a description of a possible privileged communication (para. 54). At the same time, the evidentiary burden should account for the accused lawyer's familiarity with, and inability to disclose, the content of the privileged communication. As urged by the intervener Attorney General of Ontario, an accused lawyer who believes that a privileged communication could raise a reasonable doubt as to their guilt can simply attest to this, such as in an affidavit.

Though *Fox* dealt with a fairly unusual situation, any degree of flexibility is welcome here, and the decision suggests that the harsh language of *McClure* might not forever hold sway — at least insofar as the first stage of the test is concerned. *Fox* cites from *McClure*, noting that at this point the objective is simply to "ensur[e] that there is some evidentiary basis for the request and preven[t] fishing expeditions and unnecessary intrusions into privileged communications". But overall, *Fox* sounds a softer tone, making it more likely that production of the communication for Stage 2 will occur: *R. v. Fox*, 2026 SCC 4.

Improperly Obtained Evidence — Exclusion of Evidence Under the Canadian Charter of Rights and Freedoms in Criminal Cases — Society's Interest in an Adjudication on the Merits —The Nature of the Proceeding — In *R. v. Breton*, a decision of the Ontario Court of Appeal, police seized a large quantity of cash during an unconstitutional search. The evidence was excluded under s. 24(2) of the Charter at the criminal trial, and the Crown later sought forfeiture of the cash under s. 490(9) of the *Criminal Code*. The question was whether the same evidence should also be excluded from the forfeiture proceeding. Writing for the Court of Appeal, Fairburn J.A. held that the s. 24(2) analysis had to be conducted in light of the distinct purpose and circumstances of the forfeiture proceeding. Section 24(2) asks whether admission of the evidence "in the proceedings" would bring the administration of justice into disrepute. Fairburn J.A. held that the s. 24(2) analysis had to reflect the distinct nature of the proceeding in which the evidence was tendered. Although the seriousness of the Charter-infringing conduct and its impact on the claimant's protected interests remained unchanged, society's interest in adjudication on the merits had to be evaluated differently. Fairburn J.A. emphasized that, in a criminal trial, "liberty is at stake," whereas in a proceeding under s. 490(9), "property is at stake". The absence of penal consequences altered the weight to be assigned to the court's need to dissociate itself from state misconduct. Fairburn J.A. also identified a practical difficulty with excluding the property itself. A person seeking the return of seized property cannot readily insist that the property and all information concerning it be removed from the court's consideration. Doing so would make it impossible for the judge to determine whether the property should be returned or forfeited and would "frustrate the entire purpose of s. 490". Moreover, seized property cannot remain indefinitely

in state custody. “Doing nothing is not an option” because the statutory scheme requires the court eventually to decide whether the property should be returned to the person from whom it was seized, delivered to another lawful owner, or forfeited. The evidence was thus admitted: *R. v. Breton*, 2025 ONCA 781.